(10)

No. 98-678

IN THE SUPREME COURT OF THE UNITED STATES

Los Angeles Police Department,
Petitioner,

v.

United Reporting Publishing Corp.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

BRIEF OF *AMICUS CURIAE* INVESTIGATIVE REPORTERS AND EDITORS, INC. IN SUPPORT OF RESPONDENT

DAVID BRIAN SMALLMAN
Counsel of Record
c/o Investigative Reporters
and Editors, Inc.
The Missouri School of Journalism
138 Neff Annex
Columbia, MO 65211
(573) 882-2042

July 20, 1999

38pp

QUESTION PRESENTED

Whether the First Amendment prohibits the Los Angeles Police Department from concealing the identity of arrestees by withholding their residence addresses from the public under circumstances in which (1) national experience, including common practice in America when the Constitution was adopted, provides for a tradition of public accessibility to event-based information about arrests; (2) public knowledge about the identity of people arrested (including residence address information to avoid confusion with individuals having the same or similar name) plays a significant positive role in the proper functioning of the criminal justice system.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*

Quis custodes et custodiet? Almost a thousand years ago, the Romans pondered the dilemma inherent in delegating law enforcement authority to their government by posing a simple question: *who guards the guards?* Juvenal, SATIRES VI, act I, l. 347 (Niall Rudd Trans, Clarendon Press 1991). Today, a similar paradox is presented by the dual role of the government as both a logical source of protection from violations of personal privacy and an information collector with monopoly power over criminal justice data.

In this case, the Los Angeles Police Department ("LAPD") asserts that California has complete discretion to regulate dissemination of any "private information" it gathers in connection with administration of the state criminal justice system. The statute at issue purports to protect the privacy interest of arrestees. It does so by limiting dissemination of residence address information collected by the police as part of their traditional booking procedure. Although the narrow question presented by LAPD appears to concern only restrictions on commercial speech, arguments in support of reversing the decision below require petitioner and its *amici* to assert that access to information necessary to establish with reasonable certainty the identity of arrestees could be denied to *any* person outside the government. This claim, however, contradicts a tradition of public access to core information about arrests that dates back to the founding of the Republic It also contravenes competing interests, such as citizen participation in fair and effective law enforcement and a citizenry fully informed about the operations of their government. *See* William H. Rehnquist, *Is an Expanded Right to Privacy Consistent With Fair and Effective Law Enforcement?*, 23 Kan. L. Rev. 1, 2, 8 (1974) ("*Effective Law Enforcement*").

Amicus Curiae Investigative Reporters and Editors, Inc. is a not-for-profit organization dedicated to improving the quality of investigative reporting within the field of journalism.[1] Its more than

---

[1] Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support.

4,000 members work for the nation's leading broadcasters, cable operators, newspapers, magazines, and new media companies, and are directly engaged in the day-to-day practice of acquiring and disseminating news to the public. Together with the Missouri School of Journalism, IRE also operates the National Institute for Computer-Assisted Reporting, which trains reporters in the practical skills of analyzing electronic information and provides databases for use by professional journalists. IRE's interest in this case is based upon sweeping assertions of informational privacy by LAPD and its *amici*. If successful, LAPD's assertions of these novel privacy claims could effectively cut off at the source access to information about arrests that have been available to Americans since at least the mid-1700s.[2] Consistent with the Constitutional mission of its members to supply information about the operations of government to the public, [3] IRE has gathered for the Court materials not otherwise provided by the

---

[2] Logic suggests that the government is typically the sole source of residence address information for an individual still in custody. For this reason, LAPD's assertion that Section 6254(f)(3) "would only 'cut off the information at its source' if it prohibited arrestees from disclosing their own addresses'" misses the mark. *See* Brief of Los Angeles Police Dept "("LAPD Br.") at 34-25 n.14. To whom could an arrestee impart such information when she is in a holding cell, other than her fellow inmates? Moreover, LAPD's refusal to disseminate an arrestee's residence address to the general public has the practical effect of preventing accurate identification of arrestees because so many individuals have the same or similar names. *See, e.g.*, <http://search.bigfoot.com/SEARCH> (visited May 23, 1999) (more than 250 listings in State of California alone for common name such as "John Hall").

[3] *See, e.g., Wilson v. Layne*, 119 S. Ct. 1692, 1698 (U.S. 1999), in which the Court noted that

> 'In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.' No one could gainsay the truth of these observations.

parties regarding relevant historical practices at the time of the adoption of the Constitution. In doing so, IRE seeks to assist the Court in its evaluation of "what sort of limits shall be placed on the government in its effort to enforce laws enacted by the legislature." *Fair and Effective Law Enforcement*, 23 Kan. L. Rev. at 19.[4]

SUMMARY OF ARGUMENT

LAPD and its *amici* assert, without basis, that there is no Constitutional impediment to concealing from the general public current facts about the identity of arrestees. Without access to this information, the general public cannot ascertain with reasonable certainty *who* is arrested and *why*? LAPD claims, however, that a privacy interest in the residential address information it collects from arrestees allows California complete discretion to deny anyone outside government access to those facts. The historical record, however, demonstrates that a tradition of public access to information about the identity of arrestees extends back to the founding of the Republic. Moreover, competing interests, including the public's right to be informed about core operations of the criminal justice system, together with promotion of citizen participation in fair and effective law enforcement, demonstrates a significant positive role played by continued access by the public to event-based facts about the identity of arrestees.

---

[4] LAPD acknowledges in a footnote that regulating press publication of arrestee addresses *en masse* "would require the state to interfere directly with the editorial discretion of newspapers, a cure that the state may deem to be worse than the disease." LAPD Br. at 36 n.21. Elsewhere in its brief, however, LAPD states that "[h]ad the California legislature so desired, it could have eliminated all public access to the addresses of arrestees and victims." *Id.* at 16. LAPD also appears to suggest that California retains the discretion to "thwart" access by the press and thereby "undermine a central First Amendment value." *Id.* at 40.

ARGUMENT

I. A FIRST AMENDMENT RIGHT OF PUBLIC ACCESS APPLIES TO CURRENT FACTS ABOUT THE IDENTITY OF ARRESTEES BECAUSE NATIONAL EXPERIENCE, INCLUDING COMMON PRACTICE IN AMERICA WHEN THE CONSTITUTION WAS ADOPTED, HAS ESTABLISHED THIS TRADITION

LAPD and its *amici* acknowledge that a qualified First Amendment right of access – based on the crucial role traditionally played by public access in the functioning of the criminal justice system – applies to criminal proceedings. *See* Brief of the States of New York *et al.* As *Amici Curiae* in Support of Petitioner ("State Prosecutors Br.") at 7 n.1 Brief of United States as *Amicus Curiae* Supporting Petitioner ("US Br.") 16 n.1. ("a qualified constitutional right of access to judicial proceedings that have traditionally been held in public, with a concomitant or alternative right of access to records of those proceedings."); Brief for Petitioner ("LAPD Br.") at 18 and 18 n.8 & 9.[5] Referring solely to case law, but failing to cite any historical evidence, LAPD and its *amici* maintain that the Constitution does not create aright of access under the circumstances presented here. [6] LAPD Br. At 16; State Prosecutors Br. at 7 n.1 (qualified First Amendment right of access to criminal proceedings "has never

[5] Decisions of this Court between 1980 to 1986 have recognized a qualified First Amendment right of access to preliminary hearings, jury selection, criminal trial during testimony of a minor victim, and, as a general matter to criminal trials (plurality opinion). *See* State Prosecutors Br. at 7 n.1 (listing cases).

[6] At least one state supreme court has recognized that "the public and the media have a constitutional right of access to information relating to the activities of law enforcement officers and to information concerning crime in the community. *Caledonia Record Publishing Co. v. Walton*, 154 Vt. 15, 22, 573 A.2d 296, 299 (1990) (in order to determine reach of this constitutional right, it is necessary to balance competing interests).

been held to extend to the contents of a police blotter").[7] Having

[7] Notably, *amicus curiae* the United States of America appears to differ with LAPD on this crucial point. Perhaps anticipating (but not itself marshaling) the relevant historical information, the United States acknowledges that "a governmental decision not to provide any information about some or all arrests might raise [First Amendment] concerns, **particularly if (as seems likely) there proved to be some historical tradition of making public at least some information about the exercise of that core government power [of arrest]**." *Id.* (emphasis added). The United States asserts, however, that this case raises no constitutional issues because "California continues to provide full public access to detailed information on every arrest and crime report -- all information, indeed, except the "current address" of the . . . person arrested.". *Id.* at n.15. This concession , however, is a legal equivalent to the medical assurance that "the operation was a success, but the patient died." Elsewhere, the Department of Justice has implicitly acknowledged that an arrestee's name alone, without some other additional information, is insufficient to provide positive identification. *See Use and Management of Criminal History Record Information: A Comprehensive Report* (Glossary at 4) (US. Dept. Of Justice, Office of Justice Programs, Bureau of Justice Statistics 1993) (*"DOJ Criminal History Record Report"*) (available at <http//www.search.org>) ("Because individuals can have identical or similar names, ages, etc., **identifications based on such characteristics are not reliable**") (emphasis added); *see also* id. at 17 ("name searches are not fully reliable"); Robert R. Belair, *Criminal Justice Information Privacy* 54 (Keynote Presentation, Symposium on Integrated Justice Information Systems/The National Consortium for Justice Information and Statistics) <http://www.search.org/1999> (visited May 21, 1999) ("[m]ismatched information . . . is a major privacy threat and is associated with name-only checks. . . . The use of aliases and the failure of name-only checks to retrieve available criminal histories increases the possibility of false-negative findings during background checks and can create a public safety threat"). (Accordingly, failure to provide residence address information deprives the public of information reasonably required to avoid misidentification of persons arrested with individuals having the same or similar names. Disclosure of a residence addresses provides the least intrusive unique coordinate that prevents misidentification while, at the same time, satisfying the historical tradition of access. *See DOJ Criminal History Record Report* at Glossary 4 (discussing use of biometric characteristics such as fingerprints, retinal images, and voice prints for identification).

failed to evaluate the relevant history, none of the three briefs filed in support of Petitioner considered these key facts in light of well-established precedent with respect to finding a qualified First Amendment right of access."[8]

In past cases, this Court has established the existence of a First Amendment-based right of public access by conducting a two-part inquiry. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*").; *El Vocero De Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (*Press-Enterprise* test controls question of First Amendment right to public access). The first prong requires a historical inquiry (here, whether contemporaneous information about the actual identity of persons arrested has traditionally been available to the general public at the time our Constitution was adopted). *Press-Enterprise II*, 478 U.S. at 8. The second prong involves a functional inquiry (whether public

---

[8] This is a serious defect in LAPD's argument because its assertion of complete discretion to close off access to current facts about the identity of arrestees hinges upon the absence of a presumptive First Amendment right of access. LAPD and its *amici* assert this position in connection with their effort to sustain the constitutionality of a statute that conditions access to arrestee addresses upon agreement not use that information for "commercial purposes." *See* Cal. Gov't Code § 6254 (Deering 1997). The purported basis for curtailing such access is to ensure the privacy of persons who have been arrested by protecting them from commercial solicitations. LAPD Br. at 30-32. LAPD avoids claiming that this information should be withheld because arrestees have a recognized constitutional right of privacy in the mere fact of an arrest. *See Paul v. Davis*, 424 U.S. 693, 712-714 (1976) (no constitutional privacy right affected by publication of name of arrested but untried shoplifter). Rather, LAPD argues that that the "booking" data it gathers is merely a government record containing "personal" information. LAPD Br. at 25 & n.15. As such, it is up to "political institutions" to weigh any privacy interest that may be at stake with other, competing values. LAPD Br.at 25, 34. The monopoly interest asserted by LAPD , however, does not comport with any legitimate state interest. Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 75 N.Y.U. L. Rev. 354, 368-71 (1999).

access plays a significant positive role in the functioning of the particular process-- in this case, the overall administration of the criminal justice system). If the particular proceeding in question passes these tests of "experience and logic," a qualified First Amendment right of public access attaches:

> [T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.

478 U.S. at 8-10. (citations omitted).

As a threshold matter, then, this brief reviews evidence that information about the identity of arrestees has "historically been open to the press and general public." *Id at 8.* The analysis focuses upon practices antedating and attending the adoption of the First Amendment:

> [A] common-law tradition of openness at the time the First Amendment was ratified suggested an intention and expectation on the part of the Framers and ratifiers that those proceedings would remain presumptively open . . . .history matter[s] primarily for what it reveal[s] about the intentions of the Framers and ratifiers of the First Amendment.

See Press-Enterprise II, 478 U.S. at 21 (Stevens J. and Rehnquist J. dissenting) *See also* Leonard W. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 213 (1988) ("ORIGINAL INTENT").[9]

---

[9] For example, Professor Levy, relying upon "historical evidence . . . at the time when our organic laws were adopted," see *Press-Enterprise II*, 478 U.S. at 21, observes that

> When the Framers of the First Amendment provided that Congress shall not abridge the freedom of the press, they could only have meant to protect the press with which they were familiar and as it operated at the time. In effect, **they constitutionally guaranteed the freedom of the press as it existed** and was practiced at that time.

ORIGINAL INTENT at 213 (citations omitted) (emphasis added). *See also* Leonard W. Levy, EMERGENCE OF A FREE PRESS 206 (1985). *Cf. Payton v. New York*, 445 U.S. 573, 592-93 (1980) (examination of common-law understanding

See also LAPD Br. At 19 (a qualified right of public access pursuant to the First Amendment can arise from "unbroken, uncontradicted history" of such rights of public access and from "common practice America when the Constitution was adopted") (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565, 583 (1980); *Press-Enterprise Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 508 (1984) ("Press-Enterprise I")).

A. Public Accounts of Criminal Conduct from the Colonial Period through the Ratification Era

Newspapers containing the names and descriptions of persons associated with criminal conduct were widely available in colonial America. See *infra* at 11-16. The source of that information, however, did not depend upon an exercise of judicial or other government discretion as conjectured by LAPD. *See* LAPD Br. at 19.[10] Indeed today's vast network of federal, state, and local law enforcement officers would be utterly foreign to our colonial forebears":

> Law enforcement in colonial times was . . . 'a business of amateurs.' Public order was maintained by a loose system of sheriffs, constables, and night watchmen. Most counties had a sheriff, appointed by the governor of the colony as the chief law enforcement officer, in charge not only of jails and

---

of officer's authority to arrest sheds light on what Framers of Fourth Amendment might have thought to be reasonable).

[10] This variety of specious reasoning has been called the "fallacy of factual verification," or, more specifically, "the fallacy of the hypostatized proof." *See* David Hackett Fischer, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 55-56 (Harper & Row 1970). According to Fischer, "this form of error commonly occurs when a historian reifies a historiographical interpretation and substitutes it for the actual historical event it allegedly represents and then rejects contradictory interpretations or affirms compatible ones." *Id.* at 56.

> prisoners, but of jury selection as well. But sheriffs had no professional law enforcement staffs under their direction. Instead, ordinary citizens who were employed in other trades or professions as their means of livelihood took turns serving as constables during the day or watchmen during the night.

Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 835 (1994)[11]. *See* Lawrence M. Friedman, A

---

[11] Professor Steiker further observed that

> The constabulary 'carried the main burden of law enforcement,' as its members were required to patrol during the day as well as supervise the night watch . . . . The constables generally served without training, uniforms, weapons, or other accoutrements of modern law enforcement officers. They ordinarily did not receive stipends, but were sometimes compensated by private individuals for the return of stolen property. The night watch was equally amateurish; early attempts to have a paid watch in New York and Boston ultimately failed because it was so expensive; thus the watch was generally staffed by requiring all citizens to take a turn "in the duty of watch and ward." . . . The constabulary and the watch differed from modern law enforcement structures not only in personnel, but in function; their duties often strayed quite far from our modern notions of peacekeeping and investigation . . . . On occasions when greater manpower was needed to accomplish the goals of law enforcement, the colonial recourse was once again to amateurs. . . .Constables or watchmen could issue the "hue and cry" in town squares and public marketplaces, calling out ordinary citizens to help chase after suspected criminals. Magistrates or sheriffs could call upon the posse comitatus--literally, "the power of the county" -- for assistance . . . . In both cases, however, the help that was summoned was not the professional arm of government that we now associate with law enforcement; rather, it was the force of lay people brought to bear on suspected wrongdoers in their own communities.

107 Harv. L. Rev. 830-33 (citations omitted).

HISTORY OF AMERICAN LAW 252-53 (1973) (even the largest cities did not have police forces until well into the 19th century; in rural areas, there was no professional enforcement at all); Edward H. Savage, A CHRONOLOGICAL HISTORY OF THE BOSTON WATCH AND POLICE (FROM 1631 TO 1865) 11 (Boston, 1865); Douglas Greenberg, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK (1691-1776) 156-57 (1974); David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1195-1212 (1999).

Thus, notwithstanding the absence of organized police departments in the early years of the Republic, chronological event-based information about criminal conduct -- the equivalent of today's police blotter -- was apparently available from local authorities and directly from the citizens themselves in their overlapping roles as lay enforcers of the law.[12] "Local and intercolonial news" appearing in

---

[12] According to the Department of Justice's own account, *supra* at Note 7,

> At the beginning of [the twentieth century] there was hardly such a thing as a criminal history record, much less a criminal history record system. Indeed, prior to 1835 not a single American city enjoyed even an organized police force, much less an organized police record system . . . . Rather, throughout the 19th century, most urban American police departments, if they kept records at all, kept what can be called the precursor of the criminal history record -- the so-called "police blotter." The blotter was, and is, a purely chronological listing of events occurring each day in a particular police department or, more often, a particular precinct or subdivision of a police department. Customarily, the blotter contains the name, age, sex and race of persons arrested, along with citations to alleged offenses

DOJ Criminal History Record Report at 20. The Department of Justice further notes that

> [t]he booking process is a critical stage in the information flow in a criminal case. Booking typically involves an entry into a chronological arrest log or arrest register . . . . The booking process . . . includes the taking and recording of personal information about the arrestee, such as name, address, date of birth, sex, race, eye and hair

papers such as THE NEW ENGLAND COURANT, the BOSTON EVENING-POST, THE BOSTON GAZETTE, and THE PENNSYLVANIA GAZETTE was furnished by "[p]iracy and privateering . . . fires, counterfeiting, murders, robberies, and suicides." Frank Luther Mott, AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 250 YEARS (1690 TO 1940) 52 (The Macmillan Co. 1941) ("AMERICAN JOURNALISM").[13] Such information served a variety of purposes, from maintaining social order through public ostracism, *see, e.g.*, Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1912-15 (1991), to assisting with the apprehension of culprits and the recovery of stolen property. *See* Harry B. Weiss and Grace M. Weiss, AN INTRODUCTION TO CRIME AND PUNISHMENT IN COLONIAL NEW JERSEY 25 (1960).[14]

For example, anxious to alert fellow citizens to their plight, reward notices were routinely inserted in newspapers by persons suffering losses by theft between 1738 and 1779:

> The rewards offered for stolen property varied according to the value of the property and ranged

---

> color, weight and any scars, marks or tattoos that may be useful in identifying the person.

Id. at 10.

[13] A growing number of newspapers during this period kept their readers informed about less than exemplary conduct of their fellow Colonists. "By 1735 there were five newspapers in Boston, a town which still had less than 20,000 population . . . .37 newspapers were in the course of publication in the colonies on April 17, 1775 when the first military activities of the Revolution began." AMERICAN JOURNALISM at 22, 101. See generally Sidney Kobre, THE DEVELOPMENT OF THE COLONIAL NEWSPAPER 44-94 (Peter Smith 1960).

[14] It is worth noting that in both instances, dissemination of information to the general public about the identity of arrestees to the general public contributed to more effective enforcement of existing laws. The same is true for current dissemination of the same type of information, although in different ways. *See infra* at II.

> from 30 to 200 shillings. Frequently rewards were offered separately, one for the capture of the thief and one for the return of the property . . . .In spite of rewards, it is believed that only a small percentage of the thieves were captured and the goods recovered. According to the reward notices, many of the thefts occurred by persons who were known and described, probably servants **In nearly all cases, the published descriptions of the criminals were complete enough to result in their capture** had there been sufficient methods of communication and cooperation between police officials.

Id. at 24-25 (emphasis added).

In sum, the following selected excerpts from newspapers published between 1751 and 1791 reveal that, contrary to the assertions of petitioner, *see* LAPD Br. at 21 ("experience suggests that newspapers do not generally print addresses"), it was common practice in America both prior to and after adoption of the Constitution to identify arrestees publicly and with great specificity.[15]

- **THE PENNSYLVANIA GAZETTE, December 24, 1751** (name, personal relative, and charge): *Last Week Esther M'Connell (the Mother of Mary M'Connell, mention'd lately in this Paper) was committed to the Jail of this City, for the harbouring of John Webster, and receiving Goods from him, knowing them to be stolen: And Webster's Wife was sent to the Work-House.*
- **THE PENNSYLVANIA GAZETTE January 29, 1752** (name, personal relative, location of relative, charge, diction, physical description, clothing): *Philadelphia, January 29, 1752. LAST night broke out of the goal of the county of Gloucester,*

---

[15] Identifying characteristics of arrestees and criminal suspects mentioned in the newspaper articles, including residence information, are listed parenthetically after the date of publication. Residence information is bolded for emphasis.

> *son of John Gosling, **of Greenwich**, in the county aforesaid, by trade a blacksmith, has been used to tend a saw-mill, and can do most sorts of plantation work, of a middle stature, and a tawny complexion: Had on, and took with him, a new beaver hat, and an old one, linnen cap, dark coloured camblet coat and waistcoat, an old brown cloth coat, and an old bluish colour'd cloth waistcoat, check shirt, leather breeches, old light colour'd worsted stockings, new shoes with a pair of square metal buckles. The other named Morgan Rorke, an Irishman, of short statute, speakes tolerable good English, served his time to plantation-business in East-Jersey: Had on a half worn beaver hat, linnen cap, lightish colour'd home-spun coat, about half worn, a homespun greenish colour'd Jacket, check shirt, old leather breeches, grey yard stockings, double-soal'd shoes, with steel buckles. Whosoever takes up and secretes said Prisoners, in any goal, so that they may be had again, shall have Three Pounds reward for each, and reasonable charges paid by John Mickle, Sheriff.*

- **THE PENNSYLVANIA GAZETTE, February 11, 25, 1752** (name, charge, occupation, place of residence, punishment):

> *PHILADELPHIA, February 11. Saturday last one William Kerr was committed to the Jail of this City, on Suspicion of having counterfeited the Mill'd Pieces of Eight. There were several bad Ones found upon him, and a Receipt for the mixing of Metals. He pretends to be a Weaver, and **says he lives at Bethlehem, in the Jerseys**, with one William M'Crackken . . . ..*
>
> *PHILADELPHIA, February 25. Last Week William Kerr (lately mention'd in this Paper) was indicted and convicted at the Mayor's Court, of uttering Counterfeit Mill'd Pieces of Eight, knowing them to be such, for which he receiv'd Sentence as follows: To stand in the Pillory one Hour To-morrow, to have his Ear nail'd to the same, and the Part nail'd cut off: And on Saturday next to stand another Hour in the Pillory, and to be whipt Thirty-nine*

Lashes, at the Cart's Tail, round two Squares; and then to pay a Fine of Fifty Pounds.

• **CONNECTICUT COURANT AND WEEKLY INTELLIGENCER, February 25, 1788** (Name, place of residence, age, physical description, charge): *Broke out of goal in Tolland in the night of the 9th instant, and made their escape the following persons, viz. Simeon Belknap, **lately of Essington**, about 60 years of age, about 6 feet high, short gray hair, light eyes, committed for costs of prosecution. Also, Knoles Shaw, **a transient person**, committed for counterfeiting money, a well made fellow of midling stature, about 30 years of age, pitted with the small pox, black eyes and dark hair. Whoever will take up and return said fellows to said goal, shall have Ten Dollars reward for each and necessary charges paid, by ELIJAH CHAPMAN, Jun. Sheriff. Tolland, Feb. 22, 1788.*

• **CONNECTICUT COURANT, AND WEEKLY INTELLIGENCER, April 14, 1788** (Name, place of residence, charge): SPRINGFIELD, April 9. *We hear from **Chester**, that on Sunday se'night, a young woman, by the name of Convas, daughter of Mr. Benjamin Convas, **formerly of that place**, delivered herself of a male bastard child, which to hide her misfortune from the uncharitable censures of the world, she murdered, and deposited it in a secret place--- The family in which she resided, had for some time previous to the taking place of this event, been suspicious that she was far advanced in her pregnancy, but this she had ever denied, in the most positive terms--However, rising on Sunday morning, somewhat later than her usual time, and her countenance bearing an aspect which she had not heretofore discovered, the suspicions of the family now began to be strong than ever, whereupon they were led to conjecture what had happened; a search was accordingly made, and after some time, the child was found, rolled up in a bunch of tow, and put in a by-part of the house--On this discovery being made, she affirmed that the infant was still-born--upon which a jury of inquest*

were summoned, who sat upon the body, and the purport of their verdict was, that the child was born alive, but that she inhumanly smothered it--on which she confessed the fact, and is now in safe custody.[16]

• **CONNECTICUT COURANT, AND WEEKLY INTELLIGENCER, November 9, 1789**(name, charge, state of residence): *Stopped and taken from a Thief, a the house of Mr. Zechariah Allen, in East-Windsor, a dark bay mare, about eight years old, a star in her forehead, and hind foot a little white. Said thief calls his name Benjamin Lilly, **of York state**, and that he received the mare in Stafford of a stranger. Whoever has lost said mare may see her by applying to us the subscribers--or said thief by calling at Hartford gaol. ZECHARIAH ALLEN, ELISHA HILLS, East-Windsor, October 31, 1789.*

• **DUNLAP'S AMERICAN DAILY ADVERTISER, January 5, 1791** (name, charge, physical description, dialect): *Three Dollars Reward. Was stolen on the 31 of December 1790, out of the house of the subscriber, a great coat, a close body ditto, a pair of white rib stockings a pair of shoes and plated buckles by a certain John Jones: he is about 5 feet 8 or nine inches high, dark complexion, speaks much on the Welch dialect. Whoever takes up said thief, and secures him in any jail, so that the owner gets the Goods again, shall receive the above Reward. William Bowen, Willistown, Chester county, Jan 3 4tlAW*

---

[16] *See generally* Lawrence M. Friedman, *Crimes of Mobility*, 43 Stan. L. Rev. 637, 654 & n.81 (1991) ("*Crimes of Mobility*") (citing Peter C. Hoffer & N.E.H. Hull, MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND 1558-1803 (1981)). By the mid-eighteen hundreds, public awareness of this problem led to legislation making it "an independent crime to conceal the birth and death of a child." Crimes of Mobility at 654 & n.81 (citing Lucius Q.C. Elmer, A DIGEST OF THE LAW OF NEW JERSEY 163 (J. Nixon 2d ed. 1855) (specific crime to "endeavor privately, by drowning or secret burying, or in any other way . . . to conceal the death of any . . . issue . . . which, if it were born alive, would by law be a bastard").

• **THE CONNECTICUT COURANT, April 18, 1791**(name, alias, charge): CHARLESTON, March 24–Yesterday between twelve and one-o'clock, was executed pursuant to his sentence, Thomas Walsh, who has been long known in this state and Georgia, by the appellation of Major Washington, for counterfeiting the indents issued by the authority of this state. . . .At a few minutes past twelve, he ascended the scaffold, attended by the officers of execution; and was assisted in his devotions by the Rev. Dr. Keating . . . to whom, as we are informed, he had confessed that his name was Walsh, and was born of respectable family in Ireland. . He politely waived his hand to the crowd and said, 'Good day gentlemen,' then stepping forward on the dead-fall, he pulled the cap over his face, saying 'Col. Ofborne, I am ready,' and was immediately launched into eternity.

• **THE CONNECTICUT COURANT, May 15, 1791** (name, town of residence, charge): *Last Monday morning, the following horrible deed was perpetrated at* ***Windsor*** *by Selah Sheldon, the father of three children, two sons and a daughter, the youngest aged sixteen months.—Taking the opportunity when his wife and her father were withdrawn a few rods from the house, leaving the eldest in the bed, the youngest in the cradle, and the second sitting at his foot; he came out with an axe, and alying the head of his youngest child over the side of the cradle, and after two or three strokes on its neck, as appeared by observation, cut its throat in the most awful manner. The second child in her fright ran with the tidings to her mother, who hastening into the house found her husband holding the weapon of death over the eldest son whom he had dragged from the bed to the floor—seizing instantly the axe she prevented the uplifted stroke. A jury was called who pronounced the babe to be murdered. The unnatural father was immediately taken into custody, and was permitted to attend the remains of the slaughtered babe to the meeting-house, where a Sermon adapted to the occasion was delivered by the Rev. Henry A. Rowland, from Eccles. ix. 3. 'The heart of the sons of men is full of evil, and madness is in their heart while they live, and after that they go to the dead.' He was afterwards sent on by authority to be committed to the common goal to await his trial.*

B. Public Identification of Persons Arrested – including Residence Address Information – in the Early to Mid-Nineteenth Century

As the population of the country increased throughout the early 1800s, the colonial and Ratification -era tradition of identifying arrestees continued and expanded.[17] The evolution of the 'penny press' which occurred during the presidencies of James Monroe, John Quincy Adams, Andrew Jackson, and Martin Van Buren, coincided with increased urbanization and formalized an earlier process through which newspapers had provided the public with event-based information about who was arrested and why:

> In the late 1820s and early 1830s, the editors of New York's dailies began to turn newspaper reporting into a specialized vocation. By sending employees out into the city's courtrooms and streets, they created a new kind of journalist, one whose primary role was not that of editorial writer, but rather that of professional spectator. These "reporters", as they immediately came to be known, created something new in newspaper journalism, a daily, often exhaustive scrutinization of the spectacles and secrets of a chaotic and violent urban world. In the courtrooms of the burgeoning city, with their seemingly endless

---

[17] References to an arrestee's town or county of residence, for example, were eventually replaced with specific street address information. *See infra* at 20.

> barrage of drunkards, prostitutes, and street brawlers, the newspaper reporter turned what remained an eighteenth-century journalism into one which uncompromisingly confronted the nineteenth-century metropolis. In doing so, he fostered an appetite for a journalism of revealed vices and sensations, creating a new role for the newspaperman as monitor of an urban environment that appeared increasingly uncontrollable to many of its own denizens.

Steven H. Jaffe, *Unmasking the City: The Rise of the Urban Newspaper Reporter in New York City, 1800-1850* 76 (1989) (unpublished) Ph.D. dissertation, Harvard University (on file with the Harvard University Library) ("*The Rise of the Urban Newspaper Reporter*").[18] As shown by accounts appearing in the penny newspapers of that era,

> [t] he very act of identification — the naming of names, the listing of addresses, the description of distinguishing physical characteristics — embodied the new function that urbanization prompted journalists to perform. The reporter responded to new realities and perceptions of city life; his reports from the courtroom and the streets tacitly recognized the troubling implications of rapid and disorienting urbanization for amoral accountability and moral community. By the 1830s, an observable increase in poverty, crime, and commercialized vice — all of them consequences of the city's growth from

[18] As Dr. Jaffe further observed

> The New York newspaper reporter emerged in the 1830s as more than merely a monitor of the proceedings of the Police Court and, through it, the city's festering slums. He also established a rhetorical identity for himself as an active crusader against urban disorder. By 1836, nine reporters covered the city's Policy Court for both penny and sixpenny dailies. *Id.* at 76.

> small seaport to a position as the republic's largest metropolis — had eroded confidence in the capacity of New Yorkers for spontaneous and mutual moral regulation. Into this domain of diminished accountability stepped the reporter as a professional identifier. In the pages of the new mass-circulation press, tens of thousands of New Yorkers gained access to the transgressions and identities of the most trivial offenders as well as the most dangerous.

Id. at 122-23.[19]

A review by *amicus* IRE of the original sources confirms the observations in Dr. Jaffe's thesis that names and residence address information of arrestees was commonly made available to the public through the press.[20] For example, the following item appeared more than one hundred and sixty-five years ago in THE NEW YORK SUN, September 9, 1833, under the heading *City Intelligence*:

> **Simon Isaacs of No. 248 Grand st.** was yesterday **arrested** by officers Sweet and Frank Smith on the following charge. In the month of November. 1832, **Israel Isaacs of No. 7**

[19] LAPD's erroneously asserted in its petition for a writ of certiorari that "although the press may frequently report the names of persons who have been arrested, experience suggests that such reports rarely include the arrested person's *address*" (LAPD Petition. For a Writ of Certiorari at 15). This statement is belied by historical evidence, which shows that exactly the opposite is true: nineteenth century press accounts of arrests typically included the arrested person's address (and for that matter, the victim's address as well).

[20] Describing the popularity of the police-court report in papers of the 1830s, Frank Luther Mott tells how a young printer named George W. Wisner "would get up early every morning and do the[] police reports" for $4 a week. The municipal police court was held at 4 o'clock [a.m.] and Wisner "agreed to attend it regularly and write out what was interesting, besides working daytimes at setting type." AMERICAN JOURNALISM at 222.

Division, deposited in the cart of Simon two cases of goods, the one containing winter and the other summer clothing, each one having the card of address of Israel nailed on the cover. In December Israel sent for and obtained the case of winter good, and the following month he demanded the other case, but Simon denied all knowledge of it, declaring he had never received any such case, though it was at the time in his store. A second demand was made, with the same answer, and there the matter rested until the 13th of June last, when John Lyon, who had been in the employ of Simon Isaacs gave information to Israel on the fate of the case, which he says Simon, after the first demand, hid behind the counter, and subsequently sent off to a house in Division street, where it remained until May last, when he brought it home and sold a portion of its contents in Utica and Syracuse. On this a search warrant was issued, and the balance of the case found on the premises, together with a large quantity of cloth clothing, etc., which it is supposed he obtained in a similar manner. **He was fully committed for Grand Larceny** as the case contained upwards of $475 worth of goods.

Id. at 2 (emphasis added). This type of report is representative of the contemporaneous information about arrests to which the public had access in the period when police blotters first came into common use by professional urban police departments. *See DOJ Criminal History Record Report* at 20, *supra* n._. Information about the prior day's arrests would appear regularly in a separate column devoted to crime reports. For example, on a Wednesday morning in the summer of 1835, New Yorkers learned of the names and residence addresses of persons arrested the day before by reviewing page 2 of their morning newspaper[21]:

---

[21] THE NEW YORK TRANSCRIPT, July 8, 1835, at 2.

[For the Transcript]

Police Office

*Yesterday.--**Thomas Austen and Walter**, his brother, **of 97 Mott street**, and Harmen Van Blarcam, **of 192 Mott street**, were accused of the weighty and important offence of stealing a chain cable and an anchor--which they took away in cart--from the sloop Volunteer, lying at Carlisle street wharf. Remanded for further examination.*

***Thomas Alborn**, **of 40 Laurens street**, was remanded for further examination on a charge of stealing a hat and handkerchief from William Burle, 122 William street.*

Mary M. Haner, Sarah Wellington, Catherine Birk, Henry Marshall, and Edward Starkey, were brought up by Homer, Sparks & Merritt, from a notorious house of prostitution in Anthony street, near the five points, at which place a gentleman, whose name we are requested to suppress was robbed on the fourth of July, of a pocket book containing $150--a great part of which was recovered by the officers.

***William McDow**, son of a laborer of Newburgh, **said he had no place of residence**, and was committed to prison as a vagrant.*

***Edward Sparks**, **of 300 Bowery**, was brought up for assaulting and beating **Reuben Gondey**, of **52 Bowery**. The parties settled their differences before they left the office.*

The following persons were discharged, no witnesses appearing against them:--

***William Smith**, **258 Madison street**, and **Stephen Wilstern of Waler street** (two boys) charged with sleeping, and being disorderly at an Engine house in Walnut street; **Joseph Brown**, carpenter, who said he lived at **22 Greenwich street**, charged with beating his wife; Robert Cunningham, corner of Fletcher street, near Maiden Lane, charged with being riotous, and assaulting John Doyle; **Thomas C. Bruin**, **168 Amos street**, accused of threatening*

*to shoot **John Wilkes**, of **137 charles street**, with a gun that he had in his hand.*

*Committed to Bridewell in default of sureties.--Mary Corday, in Prince street, near Elizabeth, for getting drunk; **Jerry Barrett**, **9 Walker st.** for beating Daniel Mahoney; **Jugh Carr**, **124 Mott street**, for beating his wife; **Phebe Young**, **336 Madison street**, for beating Susan Ashbey.*

Finally, a series of news articles about an infamous bigamist, thief, and alleged murderer provides compelling evidence of traditional access by the public to name and residence address information during the Jacksonian era. These articles also demonstrate how dissemination of arrest information enabled citizens to assist the police in combating criminal activity that was to thrive in the geographical and social mobility of the coming Industrial Age. *See Crimes of Mobility, 43 Stan. L. Rev.* at 639-44.

◆◆◆◆◆

Vol. II NEW YORK TRANSCRIPT No. 85
New York, Monday Morning, May 11, 1835
(Price One Cent.)

Foundlings.--The gross offense of leaving new born infants to the "pelting of the pitiless storm"--and the precarious chances of the stranger's humanity--has of late increased in this city to an alarming extent. Too little importance has, we regret to say, been attached, up to the present time, by the authorities, to the infamous outrages now almost daily practised--and with impunity too-by hard-hearted and unnatural parents, in the shameful disposal of their young, unoffending, and innocent offspring. Child-dropping is, and by all enlightened people in every age and nation has been considered as, a crime of the direst and most atrocious nature; and the retch who can be convicted of committing it, ought to be subjected to the most severe punishment, and the most degrading publicity. One of the first instances, within the last

three years, of a suspected perpetrator of this species of infamy being brought to a tribunal of justice to answer for his villainy, occurred at the Upper Police Office, before Justice Palmer, on Saturday morning. **A Mr. Charles Sterling--a man of respectable standing and appearance--residing at 178 Stanton st.** was arrested on a charge of having the Thursday previous, deposited his child--five weeks old--(wrapped in a blanket and cloak)--at the door of a respectable citizen residing in his neighborhood. The accused acknowledged the infant to be his, but denied being guilty of the offence, and stated that he had placed it out at nurse, with a woman whose name he mentioned, and knew not of its present situation until informed by the officer who took him into custody. Some females who dwell near the residence of the prisoner, related several circumstances to the magistrate, going far to contradict his assertions, and he was ordered to find bail until to-day, to appear for further examination.(emphasis added)

◆◆◆◆◆

Vol. II NEW YORK TRANSCRIPT No. 86
New York, Monday Morning, May 12, 1835
(Price One Cent.)

The Atrocities of a monster developed.--Our readers are already aware, that a man named **Charles Sterling, late of 178 Stanton street**, in this city, has been arrested on suspicion of having left his infant child to the chance of death by exposure, on the steps of a house in Madison street, on Thursday last; they also know that some females (who saw the account in the appears of the child being left there,) went to the alms house and identified the child as being Mr. Sterling's, which was the cause of his arrest. . . . Sterling was kept in close confinement, at the cells of the upper police office, until five o'clock

last evening; when, through the instrumentality of the reporter for the Courier and Enquirer, another charge was brought against him of a still more heinous nature, and which, if substantiated, will send him to the state prison.

Just as the reporter was leaving the police office in the Park, he met two ladies who were enquiring where they could get a sight of Mr. Charles Sterling, who had been arrested for deserting his child. He hold them that Mr. Sterling was at the upper police office, and conducted them thither. On the way one of the ladies stated that her maiden name was Elizabeth Gales, and that she was born at the town of Winthrop in Maine; and she was on a visit to Boston in the latter part of 1830, and at a Christmas party met with a person calling himself Capt. Chas Sterling.

He professed at that time to be a merchant, and after paying her some serious attentions, he made her an offer of marriage, which she accepted, and they were married in Boston, on the 27th of January, 1831. They immediately went to Winthrop, and resided for 6 months, with her relatives. He stated to her then that he had been married before, but that his first wife died at sea. After staying at Winthrop as long as it was convenient, they came to New York in July 1831.

[After he took all of her possessions and then deserted her] she never saw or heard of him, until her eye caught the paragraph in this paper yesterday morning, which caused her to go to the police office. When she reached the upper police office, Sterling was brought out of the cells, and placed in a back room; his wife went into the room, saw him, and instantly exclaimed, "That's the very man!" Sterling had the hardihood to deny all this and said he never saw her before. But on looking

over the property taken from his house by Hardenbrook and Tompkins after they arrested him, she found many articles belonging to her.

Sterling was taken back to his cell, and will probably be examined to day on this charge.

Miss Gales, above mentioned, was, as far as it known at present, Sterling's second wife. While she was still living he married a lady named Rose, of Ramapaw, 12 miles from Nynack, up the North River, by whom he got some property. She died 10 months since; and 9 months since he married a lady whose maiden name was MacGlossin; she died on Saturday se'n-night. He will now be tried for bigamy.

◆◆◆◆◆

Vol. II NEW YORK TRANSCRIPT No. 87
New York, Tuesday Morning, May 13, 1835
(Price One Cent.)

The Bigamist Sterling.--This man was examined yesterday at the upper police office, and admitted the fact of his having married Miss Gales, as mentioned in yesterday's paper. He was fully committed for trial on the charge of bigamy, and on that of abandoning his child. . . .

◆◆◆◆◆

Vol. II NEW YORK TRANSCRIPT No. 89
New York, Friday Morning, May 15, 1835
(Price One Cent.)

Charles Sterling again--Further exposures in relation to this villain's offense, continue to be made almost daily at the Upper Police Office, where he still remains in custody. Yesterday, a good looking woman, with a young child in her arms, presented herself before the magistrate and made certain communications to him respecting Sterling which will go far to prove that he at this time another wife living, in addition to the number he has already

been accused of having married, ill-treated, and deserted.

◆◆◆◆◆

Vol. II NEW YORK TRANSCRIPT No. 93
New York, Friday Wednesday, May 20, 1835
(Price One Cent.)

Sterling.--A few days ago we stated that further accounts had been received a the Police Office of this man's villainies, and that as soon as we could publish them, without frustrating the efforts of justice, we should do so. We are now enabled to furnish our readers with the following additional particulars:--Sterling's real baptismal name is Charles Wl., and he was born at Mount Desert, in the State of Maine. Three or four years ago he lived in Boston, where had an amiable wife and two children who, by this advising them to sail from thence to his native place in a vessel that was not sea-worthy, were drowned--he securing and absconding with all the property saved from the wreck.

When he was next heard of after this affair, he had married a handsome girl of good fortune, whom he so infamously mal-treated soon after marriage, as to compel her to leave him. The sister of this woman is still living at Port Hill. He lived for some time in Rockland Co., where he committed two petit larcenies, at the same time charging them upon other individuals, and then making his escape. Here, before he quitted, he committed a number of gross offenses, and rendered himself obnoxious to all who knew him. Subsequent to being guilty of these desperate and accumulated villainies, he seduced a young lady who now resides--with an infant eighteen months old, the fruit of their intercourse--within two miles of Bergen, in New Jersey. Two days after this, he the same place [sic]

another female became the victim of his licentiousness. This latter now resides at or near Nyack. He has, we understand, at different times, and in different places, passed himself off in the various characters of a Sea Captain, a East India Trader, a Preacher, a Doctor, a Lawyer, a Merchant, and a South Sea Whaler, and has resided at Boston, Baltimore, Bergen, Ramapaw, Mount Desert, Port-Hill, Nyack, and other places.

◆◆◆◆◆

Vol. II NEW YORK TRANSCRIPT No. 142
New York, Saturday Morning, July 18, 1835
(Price One Cent.)

TRIAL OF STERLING

The long expected trial of this notorious culprit came on yesterday, and it having been announced by us and several of our contemporaries that such would be the case, the Court at an early hour was crowded to excess. So great, indeed, was the excitement to learn the fate of this man, that not only the Court room, but every avenue leading to it was so thronged as scarcely to leave a passage for the officers, counsel, and other persons officially in attendance. . . .

The public was already aware of the charges preferred against Sterling, viz: bigamy; desertion of his child, and manslaughter.

The charge of bigamy was brought on first, which was, that the prisoner Sterling had in the year 1831, on the 27th of January, been married to a Miss E. Gale, of Boston, by the Rev. H. Bolau, of that city; and that afterwards, in the year 1834, his former wife being still alive, he was married again to a Miss Hamilton, on the 28th July, by the Rev. Mr. Chase.

The court stated that from the evidence of the different witnesses who had appeared in court,

> they were on their oaths bound to believe that the prisoner was legally and properly married on the dates mentioned, namely on the 27th of June, 1831, and afterwards during the life of his first wife, in 1834, and that under these convictions the jury must find the prisoner at the bar guilty. The jury, after a few minute's consultation, returned a verdict of guilty.

II. DISSEMINATION OF INFORMATION TO THE GENERAL PUBLIC ABOUT THE IDENTITY OF PERSONS ARRESTED SERVES AN IMPORTANT ROLE IN THE FUNCTIONING OF THE CRIMINAL JUSTICE SYSTEM

The second prong of the Press-Enterprise II test requires an inquiry into whether dissemination of information about the identity of arrestees plays a significant positive role in the overall administration of criminal justice. Recent history indicates that it does.

First, this case differs in significant respects from *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 754 (1989). That case involved disclosure of comprehensive personal criminal history data compilations -- rap sheets -- pursuant to the federal Freedom of Information statute and its enumerated exemptions. Here, because the information withheld is *current* information about the identity of a person taken into police custody (*e.g.* name, address, race, and gender), this case concerns disclosure of fundamental facts about a core process in the administration of the criminal justice system. *See Caledonian Record Publishing Co.*, 154 Vt. at 28, 573 A.2d at 303.

> [A]n arrest involve[s] a finding by a law enforcement officer that there is probably cause to believe a person has committed a crime . . .[L]aw enforcement has discretion in choosing to use the extreme power of arrest . . . . In a modern criminal justice system, it is important that the use of this discretion be exposed to public view, if only to demonstrate that the discretion is exercised in a responsible and nondiscriminatory way.

See generally Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment As a Sword*, 1980 Sup. Ct. Rev. 1, 2-3, 23 (discussing constitutional right for citizens to obtain information needed to perform constitutional duty as "ultimate sovereigns" to hold government accountable) .

Accountability in this particular instance implies more than exercising the lever in a ballot box. It also means close scrutiny of public actions and events in order to play an active role as citizens in ensuring that the laws are fairly and effectively enforced. *Cf.* Susan Casey-Lefkowitz, J. William Futrell, Jay Austin, Susan Bass, *The Evolving Role of Citizens in Environmental Enforcement*, 11 No. 5 NAAG Nat'l Envtl. Enforcement J. 40, 41 (1996).[22] One recent example of citizen oversight leading to more effective law enforcement occurred in the past year, when allegations of improper racial profiling in traffic stops on the New Jersey Turnpike led to close examination of arrest data. *See* John Lamberth, *Driving While Black: A Statistician Proves That Prejudice Still Rules the Road*, THE WASHINGTON POST, August 16, 1998 at C01. Statistical data by itself, however, provided only part of the story; individual accounts from arrestees were necessary to establish illegal conduct by the police. *See* Stephanie Saul, *Busting the Profile/Drivers Were Stopped for "Driving While Black" in N.J.*, Newsday, June 10, 1999 (details of traffic stops described by arrestees). Subsequently, the New Jersey State Attorney General launched an internal

---

[22] As the authors cogently observe:

> "[p]articipation and authority are two sides of the same coin. The government that encourages broad public participation is capable of mobilizing effective popular support of its policies. Its authority is legitimate. Citizens want the state to govern effectively.

Id. At 40-41. *See also United States v. New York Telephone Co.*, 434 U.S. 159, 175 n.24 ((1977) ("The conviction that private citizens have a duty to provide assistance to law enforcement officials when it is required is by no means foreign to our traditions") (citing *Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 17, 164 N.E. 726, 727 (1928) (Cardozo, C.J.) ("Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand").

investigation and concluded that minority motorists had been treated in a disparate fashion. *See Interim Report of theState Police Review Team Regarding Allegations of Racial Profiling* (April 20, 1999) <available at http://www.state.nj.us/lps/intm_419.pdf> (visited on July 17, 1999). Ultimately, exercise of the arrest power requires confident support of the people that it will be ' exercised vigorously but with unbending adherence to fairness and law." *See Final Report of the State Police Review Team*(July 2, 1999) (Available at <http://www.state.nj.us/lps/rpt_ii.pdf.> (visited on July 17, 1999).

Finally, the stigma of an arrest and "the unofficial sanction of public ostracism" are competing interests worthy of consideration in connection with dissemination of even current, event-based arrest records. *See Woznicki v. Erickson*, 202 Wis.2d 178, 187, 549 N.W.2d 699, 703 (Wis. 1996) ("legitimate concern for the reputations of citizens is a matter of public interest") (citing *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 430, 279 N.W.2d 179 (1979)). However, "[a]n arrest is not a "private" event," *Effective Law Enforcement*, 23 Kan. L. Rev. at 8, and Congress and numerous state legislatures have taken steps to protect the employment interests of individual arrestees without derogating the First Amendment interests of all citizens. *Id.*at 21 ("many claims of privacy, if accepted would be established at the expense of other competing values"). *See, e.g.*, Consumer Reporting Employment Clarification Act of 1998, amending Fair Credit Reporting Act, 15 U.S.C. § 1601, *et seq*.

CONCLUSION

For the foregoing reasons, the judgement of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted

DAVID BRIAN SMALLMAN
(Counsel of Record)
c/o Investigative Reporters
and Editors, Inc.
The Missouri School of Journalism
138 Neff Annex
Columbia, MO 65211
(573) 882-2042